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No. 84-112

In the Supreme Court of the United States

OCTOBER TERM, 1984

ELLIET N. ARONSON, LUCIA B. BROWNING, NOE CORDEIRO, LAWRENCE CRIVELLI, RICHARD GIGUERE, ROBERT GOLDMAN, WALTER HARUBIN, HUGO TIETZE, and JOHN ZIELINSKI,

PLAINTIFFS-PETITIONERS,

v.

SERVUS RUBBER DIVISION OF CHROMALLOY AMERICAN CORPORATION EMPLOYEES' PROFIT-SHARING PLAN, CHROMALLOY AMERICAN CORPORATION, DONALD TOBIN, TRUSTEE, AND JOHN CARUSO, TRUSTEE,

DEFENDANTS-RESPONDENTS.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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TABLE OF CONTENTS

	Page
Summary of Argument	1
Argument	2
I. The Partial Termination of the Plan and the Establishment of a New Accounting Date Did Not Unlawfully Discriminate Against Plaintiffs as Participants in the Plan	2
II. The Plan Authorized Partial Termination Without the Need for Amendment, and the Proper Steps for Partial Termination Took Place Either by Amendment or Otherwise	11
III. The Resolution of November 25, 1981 Adopted by the Pension Committee of Chromalloy American Corporation, Purporting To Terminate Partially the Servus Rubber Division of Chromalloy American Corporation Employees' Profit-Sharing Plan (the Plan) and Establishing a Valuation Date of September 30, 1981 as to the Participants of the Chicopee Facility Was an Effective Amendment of the Plan	11
Conclusion	18

TABLE OF CITATIONS

Statutes and Regulations

Labor Regulations	
29 C.F.R. §1530.200a-1	3
29 C.F.R. §2530.200a-2	
Internal Revenue Code	
26 U.S.C. §410	3
§410(b)	4
§410(b)(1)	4

	Page
26 U.S.C. §410(b)(1)(A)	4
§410(b)(3)(A)	4
§411	3
§411(d)(3)	4, 5, 7
29 U.S.C. §1140	15
Treasury Regulations	
26 CFR §1.401-6(a)(1)	5
§1.401-6(b)(2) (1981)	7
§1.411(a)-7(a)(2)	4
§1.401-6(b)(1) (1982)	8, 9
§1.401-6(b)(2) (1982)	4
Revenue Rule 81-27, Internal Revenue Bulletin 1981-4	7, 8
Revenue Rule 73-284, Internal Revenue Bulletin 1973-2	7
Revenue Rule 72-510, Internal Revenue Bulletin 1772-2	7, 8
Revenue Rule 72-439, Internal Revenue Bulletin 1772-2	7
Miscellaneous	
Special Ruling dated 9/1/75 [1980] Pension Plan Guide (CCH) §17,367S	7, 9
Sollee and Shapiro, 351 *Tax Management Pension Plans Qualifications*	9

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Summary of Argument

The decision below was in accordance with the factual circumstances presented and with the body of law that applies to the Employee Retirement Income Security Act of 1974 ("ERISA"). There is no question of law at issue that justifies the grant of a writ of certiorari here.

* Chromalloy American Corporation has no parent companies and further it has no affiliates. The only subsidiary, which is not a wholly owned subsidiary, is Albe Far East Limited.

The Internal Revenue Code sections and regulations make it clear that the partial termination was non-discriminatory and that the establishment of the new accounting date was not improper.

Under the terms of the Plan and the Plan's pertinent sections, partial termination was accomplished by amendment or otherwise.

There was nothing discriminatory about the establishment of a retroactive Valuation Date of September 30, 1981. Arguably, such Valuation Date was not, under the facts presented, retroactive.

Argument

I. The Partial Termination of the Plan and the Establishment of a New Accounting Date Did Not Unlawfully Discriminate Against Plaintiffs as Participants in the Plan.

Title I of ERISA is entitled Protection of Employee Benefit Rights. Title I defines an individual employee's rights under a pension plan and provides a mechanism to protect such rights. Historically, the concepts of discrimination in a pension plan and termination of a pension plan were created in the Internal Revenue Code. Specifically, Congress, in the Internal Revenue Code, provided that pension and profit-sharing plans would only qualify for tax benefits if they did not discriminate in favor of certain classes of employees. Additionally, the Code also provided that when a plan was terminated, either fully or partially, the participating employees would be entitled to 100% of the benefits in the plans which has been contributed on behalf of the employees.

When ERISA was enacted, the concept of protecting the rights of the individual employees was established in Title I. Among other protections, the employees were to be protected against discrimination in plan coverage or participation and also to have their rights protected in the event of plan termination.

Title I does not define what constitutes discrimination in plan participation. In addition, it does not outline what constitutes a proper termination and what the rights are of a participant in the event of a plan termination. Part 2 of Title I contains a statement of the minimum coverage standards and vesting standards which a pension plan must satisfy. Labor Regulation Section 2530.200a-1 states that substantially identical requirements for plan participation or coverage are imposed by the Internal Revenue Code. Labor Regulation Section 2530.200a-2 also provides that treasury regulations under Sections 410 and 411 of the Internal Revenue Code relating to minimum vesting and participation shall apply for purposes of Sections 202-204 of ERISA. In other words, the concepts that have been established under the Internal Revenue Code for plan participation are being incorporated by reference into the section of ERISA which is designed to protect individual employees. This interrelation is important because it provides the justification for reviewing the Internal Revenue Code sections and regulations which deal with and define what constitutes non-discriminatory practices under a plan and what constitutes a proper termination of a pension plan.

The above-mentioned labor regulations provide an additional basis to justify the detailed reliance on the sections of the Internal Revenue Code and accompanying regulations. The non-discrimination concept and the rights of a participant during a complete or partial termination were established under the Internal Revenue Code. Consequently, we must look to the Internal Revenue Code's definitions to determine if proper compliance has been met. In other words, Congress designed the Internal Revenue Code to establish the rights of the individual plan participants. Through the Internal Revenue Code, Congress established what were discriminatory practices. It also established areas of non-discriminatory practice. The enforcement provisions of ERISA are simply designed to provide a mechanism to protect individual em-

ployees against discriminatory practices. However, what constitutes a discriminatory practice is defined through reference to the Internal Revenue Code.

A corporation is not required to provide absolute equality of treatment for all of its employees in order to have a non-discriminatory qualified plan under ERISA. For example, in order for a plan to be non-discriminatory, it is not necessary that all employees participate in the plan. Section 410(b) of the Internal Revenue Code of 1954, as amended. 26 U.S.C. Section 410(b). Under Section 410(b)(1)(A), it is only necessary that 70% or more of all employees are benefited under the plan. The term "all employees" does not include employees who have not met the minimum age and service requirement of the plan (Section 410(b)(1)(A), or employees included in a collective bargaining agreement (Section 410(b)(3)(A)). Consequently, Chromalloy theoretically could have established originally a profit-sharing plan solely for the benefit of its non-union persons at its Rock Island facility and could have excluded the persons at the Chicopee facility. Such a plan would have met the participation requirements of Section 410(b)(1) and would not have been discriminatory.

Normally, a corporation which establishes a pension or profit-sharing plan reserves the right to terminate such a plan at any time. Such a plan will be treated as a qualified non-discriminatory plan under ERISA if it fulfills the requirements of Section 411(d)(3) and the appropriate Treasury Regulations (*See* 26 CFR Section 1.401-6(b)(2) (1982)). Basically, the only requirement is that upon a complete or partial termination, the rights of all *affected* employees to benefits accrued to the date of such termination, or partial termination, to the extent *funded as of such date* are non-forfeitable (Section 411(d)(3)). The Treasury Regulations, Section 1.411(a)-7(a)(2), defines accrued benefit, in the case of a defined contribution plan, as the balance of the employee's account held under the plan (any profit-sharing plan is a defined contribution plan). *See*

also Treasury Regulation, Section 1.401-6(a)(1), which states that upon termination of the plan an employee must have a non-forfeitable right to the amounts credited to his account at the time of the termination.

As long as a corporation reserves the right to terminate the plan in the plan document, it can do so at any time. The employees will only be entitled to the funds in their accounts at the time of the termination. The corporation is not required to make a contribution for the employees in the year the plan is so terminated. For example, Chromalloy could have terminated the entire Profit-Sharing Plan on December 30, 1981. If this had happened, all the employees would have been entitled to 100% of the funds in their accounts on the termination date. Chromalloy would not have been required to contribute any additional funds in the Plan for 1981. Similarly, if a valid partial termination took place, the employees whose participation was properly terminated would only be entitled to 100% of the funds in their accounts on the termination date (Internal Revenue Code Section 411(d)(3); Treasury Regulations, Section 1.401-6(a)(1)). Chromalloy would not be required to make a contribution in 1981 for the employees whose participation ended as a result of the valid partial termination.

The terms of the Plan in question reflect the procedure permitted by the above-cited Internal Revenue Code sections and pertinent regulations. Under Section 12.1 of the Plan, Chromalloy reserved the right to terminate the Plan at any time. Additionally, under Section 11.3 of the Plan, Chromalloy reserved the right to amend the Plan at any time. Further, Section 12.2 of the Plan, as amended by the First Amendment to the Plan, provides:

> *Effect of Termination.* Upon the partial or complete termination of the Plan and Trust, or in the event of complete discontinuance of the Company's contributions, the date thereof being called the "Date of Termination," each Participant affected by the partial or complete

> termination shall be entitled to one hundred percent (100%) of his account in Trust anything hereinabove to the contrary notwithstanding, determined on the Date of Termination as if such date were an Accounting Date.

Section 11.4 of the Plan provides:

> *Employment Rights.* Nothing contained in the Plan shall be construed to create a contract of employment between the Company and any person employed by the company, or to create a right in any person employed by the Company to be continued in the employment of the Company, or to limit the right of the Company to discharge any person employed by the Company with or without cause.

Thus, Section 11.4 of the Plan is intended to permit the Company to amend or terminate the Plan at any time without being faced with the claim that the Plan constituted an employment contract and, therefore, that the Company should be prohibited from unilaterally amending or terminating. Section 11.4 does not violate the rules of ERISA. This Plan was originally approved by the Internal Revenue Service, and at all time contained this provision. Consequently, Chromalloy could amend or terminate this Plan at any time, and as long as it met the requirements of the above-cited portions of the Internal Revenue Code and the pertinent regulations, such amendment or termination would not violate ERISA.

As an extreme example, Chromalloy could have terminated the entire Plan at any time in 1981 and none of the participants could have asserted a contractual right under the Plan for a contribution in 1981. Similarly, Chromalloy also had the right to partially terminate the Plan in 1981, and as long as such termination did not cause the Plan to violate the minimum participation standards of Section 410(b), the Plan would remain qualified and would not be considered discriminatory.

There is no question that in general partial terminations of profit-sharing plans may properly take place under ERISA and in fact do so with regularity. For tax purposes, terminations and partial terminations are governed by Section 411(d)(3) of the Internal Revenue Code of 1954, as amended (the "Code"), 26 U.S.C. Section 411(d)(3). The tax regulations promulgated under the Code provide in part:

> For purposes of this section, the term "termination" includes both a partial termination and a complete termination of a plan. Whether or not a partial termination of a qualified plan occurs when a group of employees who have been covered by the plan are subsequently excluded from such coverage either by reason of an amendment to the plan, or by reason of being discharged by the employer, *will be determined on the basis of all the facts and circumstances.*

26 CFR Section 1.401-6(b)(2) (1981) (emphasis added). In line with the above regulations, it is clear, therefore, that a partial termination of a plan occurs when a group of employees who are participants in the plan are excluded from participation either by reason of an amendment to the plan or by reason of being discharged by the employer. Further, it has long been established that it is unnecessary for an entire group of participants to be excluded by reason of discharge from employment. It is only necessary that a *significant* number of employees who had been covered under the plan are excluded. The Internal Revenue Service rulings supporting that position are numerous. *See, e.g.*, Revenue Ruling 81-27, Internal Revenue Bulletin 1981-4; Revenue Ruling 73-284, Internal Revenue Bulletin 1973-2; Revenue Ruling 72-510, Internal Revenue Bulletin 1972-2; Revenue Ruling 72-439; Special Ruling dated September 1, 1978, [1980] Pension Plan Guide (CCH) Section 17, 367S.

Contrary to petitioners' position, it is unnecessary that all participants in a plan, who make up a division or portion of a business that is being closed or wound down, be discharged before a partial termination of the plan can take place. In that regard, the tax regulations specifically provide:

> Whether a plan is terminated is generally a question to be determined with regard to all the facts and circumstances in a particular case. For example, a plan is terminated when, in connection with the *winding up* of the employer's trade or business, the employer *begins to discharge* his employees.

26 CFR Section 1.401.6(b)(1) (1982) (emphasis added). As stated earlier, a portion of this same tax regulation includes in the definition of "termination" both a partial termination and a complete termination of a plan.

Based upon the above-mentioned regulations, the pertinent sections of the Internal Revenue Code, and the interpretations of the above found within the pertinent Revenue rulings, it is clear that a partial termination of a plan will occur merely if a significant number or percentage of employees are excluded from participation in the plan by reason of discharge from employment, without the need for amendment of the Plan (even though an amendment did take place in this case). Thus, a partial termination of a plan can in fact take place even though all of the participants are not discharged. This specific ruling has already been set forth in Revenue Ruling 72-510. Revenue Ruling 72-510 reveals the same issues found in Revenue Ruling 81-27, and in fact those revenue rulings arose out of the same request concerning whether or not a partial termination of a plan was proper under the given circumstances. Although Revenue Ruling 81-27 superseded Revenue Ruling 72-510 in an attempt to restate the position of that prior revenue ruling in view of the enactment of ERISA, it is clear upon comparison of the two rulings that the facts

and the Court's decision are the same. Revenue Ruling 72-510 specifically refers to the language in Section 1.401-6(b)(1) of the regulations and states that a plan is terminated when, in connection with the winding up of the employer's trade or business, the employer *begins to discharge* his employees. Both rulings go on to assert the position that a partial termination may take place when "a significant number of employees who have been covered under the employer's pension plan were discharged in connection with the winding up of a part of the employer's business."

The definition as to what is a "significant" discharge of employee participants when dealing with a partial termination of a plan has never been defined clearly. However, the Revenue Rulings dealing with the subject of partial termination have one common denominator. As stated in one ruling:

> In each set of facts presented in the rulings, there was "a significant percentage" of employees who had been covered by a plan, but were subsequently excluded from participation either by discharge or plan amendment. These "significant" percentages were 70.6%, 56.6% and 80%, respectively.

Special Ruling dated September 1, 1978, [1980] Pension Plan Guide (CCH) Section 17, 367S. The above percentages were not prerequisites set within the specific revenue rulings for the validity of a partial termination but merely were based upon the facts presented in each instance. As to what percentage or number must be discharged in order that it be considered significant, one commentator has stated:

> No magic percentage or number has been specified, however, although Question 23(b) of Form 5500 indicates that the Service may look suspiciously at a more than 20 percent reduction in coverage.

Sollee and Shapiro, 351 Tax Management, *Pension Plans-Qualifications*, at A-85 (1979).

The facts in this matter indicate sufficient grounds for a partial termination of the Plan. On August 28, 1981, the substantial portion of the assets of the Servus plant at Chicopee were sold. Thereafter, all production ceased at Chicopee and there began what was characterized at the trial by both Mr. Aronson and Mr. Caruso as a winding down process. As stated by Mr. Caruso, Vice President of Finance at Servus, on August 28, 1981, there were approximately 400 employees at the Chicopee plant, whereas by the end of September there remained only approximately 50 employees. In his testimony, Mr. Caruso explained that participants in the Servus Plan were non-union employees. In that regard, as stated in a Stipulation filed by the parties prior to trial ("Stip.") and found in the defendants' Appendix to their brief in the United States Court of Appeals ("A.A."), on August 28, 1981, the number of non-union persons employed by Chromalloy at the Servus Rubber Division in Chicopee was 68, of whom 64 were participants in the Plan (Stip. 10, A.A. 69). In contrast, the number of non-union persons employed at the Chicopee facility on September 30, 1981 was 29, of whom 27 were participants in the Plan (A.A. 69).

It is clear from the facts set forth in the Stipulation and from the testimony presented at trial that immediately after August 28, 1981, production at the Chicopee facility had completely shut down and that a winding down of the business was taking place. On December 31, 1980, there were 168 participants in the Plan then employed by Chromalloy in Servus Rubber, 93 at the Servus Rubber Division in Rock Island and 75 at the Chicopee facility (Stip. 7, A.A. 69). In contrast, by September 30, 1981, at the Chicopee facility there had been employment reductions which had resulted in the discharge of 48 participants, resulting in the remainder of only 27 participants (Stip. 7 and 10, A.A. 69). By October 31, 1981, the number of persons who would have been participants but for the partial termination had been reduced at Chicopee from 22 to 18 on

November 31, 1981, and to 11 on December 31, 1981. It is clear, that by September 30, 1981, there had already been a significant discharge of employed Plan participants. Certainly well before September 30, 1981, Chromalloy, in its winding up of the Chicopee facility's business, had begun to discharge its employees as required under the appropriate tax regulation. 26 CFR Section 1.401-6(b)(1). By that date a significant number of Plan participants had already been discharged and an overwhelming number of Plan participants at the Chicopee facility had been discharged by December 31, 1981.

II. THE PLAN AUTHORIZED PARTIAL TERMINATION WITHOUT THE NEED FOR AMENDMENT, AND THE PROPER STEPS FOR PARTIAL TERMINATION TOOK PLACE EITHER BY AMENDMENT OR OTHERWISE.

III. THE RESOLUTION OF NOVEMBER 25, 1981 ADOPTED BY THE PENSION COMMITTEE OF CHROMALLOY AMERICAN CORPORATION, PURPORTING TO TERMINATE PARTIALLY THE SERVUS RUBBER DIVISION OF CHROMALLOY AMERICAN CORPORATION EMPLOYEES' PROFIT-SHARING PLAN (THE PLAN) AND ESTABLISHING A VALUATION DATE OF SEPTEMBER 30, 1981 AS TO THE PARTICIPANTS OF THE CHICOPEE FACILITY WAS AN EFFECTIVE AMENDMENT OF THE PLAN.

On November 12, 1982, Chromalloy submitted an Application for Determination to the Internal Revenue Service (Stip. 15, A.A. 71). A copy of this application on Form 5310, along with the documents submitted therewith, is contained in the Appendix on appeal at 175. Chromalloy received a determination letter from the Internal Revenue Service with respect to the Plan dated January 21, 1982 (Stip. 16, A.A. 71). A copy of this letter is contained in that Appendix at 185.

On November 25, 1981, a resolution was passed by the Unanimous Written Consent of the Pension Committee of Chromalloy American Corporation, which resolution stated:

> RESOLVED, that the Servus Rubber Division of Chromalloy American Corporation Employees' Profit-Sharing Plan be partially terminated with respect to those participants who were employees of the Servus Vinyl Division at the date of the announcement to close down that operation with the date of termination and valuation, as defined in the Plan, be established as September 30, 1981, effective September 30, 1981...

(A.A. 173).

Certain provisions of the Plan are relevant to the issues of contribution and allocation. The Plan provides in Section 4.1 for contributions by Chromalloy as follows:

> *Company Contributions.* Contributions to the Trust for a Plan Year, shall be made only out of the net profits of the company for such year, or out of accumulated earnings and profits of prior years, and shall be in such amount (which amount may be stated as a percentage of the compensation of eligible Participants) as the Company, in its sole discretion, shall determine by appropriate corporate action prior to the end of such year; provided, however, that to the extent that there are net profits available, the Company shall contribute an amount equal to three percent (3%) of the compensation of all Participants....

Chromalloy's contributions are to be allocated as follows:

> *Allocation of Company Contributions.* The Company Contributions for each Plan Year when made shall be allocated as of the end of that Plan Year to each Participant (to be credited to the Trust Account of each Participant) in an amount determined by the ratio of each Participant's Compensation paid for such Year to the total aggregate of such Compensation of all such participants for such Year....

(Section 4.5). The Plan "Accounting Date" was set as December 31st of each year (Section 2.1(g)).

The language of the Plan authorizes its termination without the need for an amendment. Section 12.1 provides in part:

> *Event of Termination.* The Company, with the approval of the Pension Committee of Chromalloy American Corporation, reserves the right to terminate the Plan and Trust, or to discontinue completely Company contributions, by giving written notice of the date of such termination or discontinuance, hereinafter referred to as the "Date of Termination," to the Trustee.

That notice to the Trustees took place cannot be disputed in view of the fact that one of the Trustees, John Caruso, was one of the individuals to sign the Application for Determination Upon Termination submitted to the Internal Revenue Service, and further that *both* Trustees (John Caruso and Donald Tobin) signed the letter concerning partial termination that was sent to all participants and received by the plaintiffs sometime after August 28, 1981 (Stip. 14, A.A. 70). In any event, the purpose of notice to the Trustee is to insulate them from liability and not actually to effectuate a termination (or partial termination) of the Plan or an amendment of the Plan. This is reflected in Section 7.1 of the Profit-Sharing Trust, which section further provides in part:

> Any action taken or omitted to be taken by the Trustee by authority of any representative of the Company within the scope of their authority shall be as effective for all purposes hereof as if such action or non-action had been authorized by the Company. The Company, and the Trustee shall be fully protected in acting and relying upon any evidence described in this paragraph.

Under the circumstances, the view that written notice to the Trustees is required absolutely before partial termination can be accomplished improperly places form over substance. Further, to impose upon the courts a requirement that, without

exception, all terms of all pension plans must be construed in favor of employees and against employers would ignore the myriad factual situations that might arise. Cases must be dealt with individually, applying the general understanding that, where the circumstances warrant it, plans should be construed in favor of the employees.

Based upon the relevant facts, the November 25, 1981 resolution as to the partial termination with respect to those participants who were employees at the Chicopee facility, and the above-mentioned portions of the Plan, it is clear that, by appropriate amendment or otherwise, the Plan was partially terminated as to the participants at the Chicopee facility as of September 30, 1981. That the resolution was adopted on November 25, 1981 retroactive to September 30, 1981 is by no means inappropriate and such practice takes place routinely. Petitioners have presented no law which prohibits the actions taken by the Pension Committee. Consequently, as of the Accounting Date of December 31, 1981, the petitioners and any other employees who might have been still employed at the Chicopee facility were no longer participants in the Plan and were not entitled under the terms of the Plan to any contribution.

Chromalloy followed all of the necessary requirements for a proper non-discriminatory partial termination. Treasury Regulation, Section 1.401-6(b)(2), already cited, provides that a partial termination of a qualified plan occurs when a group of employees who have been covered by the plan are subsequently excluded from such coverage by reason of amendment or discharge from employment. Review of the Plan indicates that an amendment actually did take place. In that regard, Section 11.3 of the Plan defines an amendment and provides in part:

> The Company reserves the right to amend the Plan at any time by written resolution of the Pension Committee of

> Chromalloy American Corporation, including, but not limited to, the right to change the amount or method of determining Company contributions.

Chromalloy, through the Pension Committee, amended the Plan to establish a partial termination by virtue of the resolution that was adopted on November 25, 1981. In addition, Section 11.3 of the Plan also provides that any amendment may, by its terms, be retroactive.

Again, it is obvious that the resolution (and therefore the amendment), was communicated to the Plan Trustees and therefore became effective.

Petitioners' argument that partial termination of the Plan as to participants at the Chicopee plant is discriminatory is unsupported by evidence or testimony. Certainly terminations or partial terminations are not discrimination *per se*. Petitioners must bear the burden of introducing some evidence indicative of actual discrimination. They failed to do so. What the evidence did reveal instead was that a partial termination properly took place as to the facility in Chicopee that had ceased operations and was rapidly discharging employees.

Petitioners' claim that respondents could have had no purpose in adopting the November 25, 1981 resolution other than to prevent petitioners from obtaining their right to a contribution was again unsupported by evidence. On the contrary, respondents were faced with a duty to attempt to give the greatest benefit to the largest possible number of participants. This included, among other things, the establishment of a Termination Date and Valuation Date which in respondents' good faith judgment would result in the best possible distribution to the largest number of participants. Respondents had no way of forecasting whether the establishment of a later date would be to the benefit or detriment of petitioners.

Respondents respectfully submit that 29 U.S.C. Section 1140, as relied upon by petitioners, was designed primarily to prevent employers from discharging or harassing their em-

employees in order to keep them from obtaining vested pension rights. The thrust of this section is to protect the participants against actions which are designed to harass him or to take away from him rights to which he is entitled under the plan. Such actions have not taken place in this particular case. The Company could have established a plan which excluded petitioners from participating in the first place. The Company chose not to take such action. Ultimately, because of an independent business decision, it terminated the operation of its Chicopee plant and at the same time terminated the profit-sharing plan with reference to these employees. It took this action as a business judgment and not to discriminate intentionally against these employees. The partial termination met the requirements of the Internal Revenue Code and was not treated as discriminatory under that section.

Arguably, the petitioners' position that the termination and valuation or accounting date were discriminatory because these dates were established retroactively is not factually correct. Based on the evidence and exhibits in the case one could conclude that the partial termination actually took place on September 30th. Arguably the documents, including the resolution by the pension committee, simply memorialize the action that took place at an earlier time, *i.e.*, September 30, 1981. As a practical matter, the accounting date is established at the same time as the date of termination for administrative convenience. Certainly there was no evidence that the Company did not set September 30th as the accounting date in order to deprive the terminated participants of additional earnings from October 1, 1981 onward. Whenever anyone terminates from a pension or profit-sharing plan, a valuation or accounting date has to be established. As a practical matter, a date has to be chosen for calculating the amount that is attributable to the account of the individual participant who is terminating. In most pension plans there are no separate funds set aside in each account. Under a plan's accounting mecha-

nism, each individual participant will be treated as having a proportionate share of the funds in the pension trust. In such a situation, all of the participants are actually sharing in the appreciation or depreciation in the assets of the trust. Consequently, when a participant terminates, an accounting must take place in order to determine what the value is of that person's share of all of the trust assets as of the day of termination. In practice, this accounting always takes place before the funds are actually distributed to a participant. Therefore, when the funds are actually distributed to a participant who is terminated, the actual market value of all of the pension trust assets at the time of distribution may have actually increased or decreased in value.

The approach adopted by the Plan here simply reflects the administrative approach that normally takes place when a participant terminates from the Plan. In this case, instead of a termination by one participant, a number of participants terminated through the partial termination of the Plan. In order to handle this administratively a termination date was established. Normally, the termination date is also treated as an accounting or valuation date. At this point in time, the value of each terminated participant's account is established. The actual distribution of the funds attributed to each participant will not take place until a number of months following the termination date. As a normal rule the participants who have been terminated do not participate in the appreciations or depreciations in the funds following the termination and valuation dates. This procedure is followed not to discriminate against the terminated participants and deny them the ability to share in the earnings and appreciation or in the depreciation in the total Plan assets. Rather, it is simply done to create an administratively proper method to account for and distribute funds. Respondents sincerely doubt the petitioners would have argued that they were discriminated against if the value of the fund assets had actually declined from September 30, 1981 until the time of actual distributions.

Conclusion

It is respectfully submitted that petitioners have wholly failed to sustain their burden of establishing under Rule 19 that there are special and important reasons why the writ should be granted. The decision below did not involve an important question of federal law which has not been, but should be, settled by this Court; nor has the Court of Appeals decided a federal question in a way to conflict with applicable decisions of this Court or of another Court of Appeals on the same matter.

Respectfully submitted,

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